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In The Supreme Court of The United States

OCTOBER TERM, 1941

No. [redacted] 97

ANSEL HIGGINS,

Petitioner,

Versus

CARR BROTHERS COMPANY, INC.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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FRANCIS W. SULLIVAN,
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In The Supreme Court of The United States

Docket No. 1552 **October Term A. D. 1941**

ANSEL HIGGINS,
Petitioner,

vs.

CARR BROTHERS COMPANY, INC.,
Respondent.

Petition for Writ of Certiorari to
Supreme Judicial Court of Maine.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

NARRATION

Ansel Higgins, Plaintiff, was a night man and shipper in the employ of Carr Brothers Company, Defendant, from October 24, 1938, to April 1, 1939 (p. 68). He was driver of a truck for the Defendant, locally and entirely in the State of Maine from April 1, 1939, to July 24, 1940 (p. 69). He was paid a fixed salary of $16.00 per week (p. 67). He never drove a truck across a state line, nor did he ship anything out of the State of Maine save for the period from October

24, 1938, to January 1, 1939 (p. 70). He never delivered merchandise to a carrier for out of state shipment (p. 70).

Carr Brothers Company is a Maine corporation with its only place of business at Portland (p. 81). During the period in controversy, it shipped no goods out of the state, sold no goods out of the state, and sold no merchandise to be carried out of the state with the exception of the Berlin, New Hampshire, trip, which it maintained from October 24, 1938, until January 1, 1939 (p. 50, 87, 89), and with the exception of a $1.50 order and merchandise valued at some $75.00 (p. 99, 100), which were sold to two individuals at Portland, Maine, and presumably carried out of the State to New Hampshire by them.

The Defendant did not engage in brokerage (p. 95). It has always purchased its goods, warehoused them and owned them before it has sold or taken orders for sale (p. 95). It has never ordered goods from out of the state to be shipped directly to the customer (p. 85). It has never taken orders prior to the purchase of merchandise. It has acquired no goods from out of the state to be halted temporarily at the warehouse and then forwarded to customers outside of the State of Maine.

The Defendant did a gross volume of business of $450,000 to $500,000 a year (p. 100). 50% of its volume was in produce raised and sold by farmers to the Defendant in the State of Maine (p. 98). The rest of its merchandise came from places outside the State of Maine (p. 82). Much of its merchandise consisted of citrus fruit from Florida a few months of the year and from California during twelve months of the year (p. 93). As to the citrus fruit from Florida and California, the Defendant had and exercised a right of inspection before buying (p. 98). The Defendant enjoyed the same right of inspection as to potatoes purchased outside of the State of Maine (p. 97).

Bananas, which were a large item, came from out of the State of Maine without a right of inspection and after arriving at the Defendant's place of business were broken up and sold in broken lots after being processed (p. 98). Most of the citrus fruit, with the exception of lemons, was sold in the original package (p. 93).

The defendant purchased some of its produce through a broker in Boston, to whom it paid a commission (p. 97). Some of the goods were purchased in car lots by the Defendant directly from various parts of the country (p. 98). The Defendant conducted a purely wholesale business.

ARGUMENT

The issue in the instant case is whether or not the Defendant from October 24, 1938, to July 24, 1940, was an industry engaged in commerce or in the production of goods for commerce.

For the period from October 24, 1938, to January 1, 1939, the trial Judge has found that the Defendant sustained a sale and delivery of goods from Portland to Berlin, New Hampshire, and that consequently the Defendant was engaged in interstate commerce. The Defendant has no quarrel with that finding, and even if it had such, it is now too late to question it. *Frank* vs. *Mallett*, 92 Maine, 79.

From January 1, 1939, to July 24, 1940, the Defendant with the trifling exceptions amounting to some $76.50 (pp. 99, 100) sold no goods to purchasers outside of Maine, or which ultimately went out of Maine as far as the evidence discloses. During the time from January 1, 1939, to July, 1940, the Plaintiff was a night man and shipper, and latterly, local truck driver, making local deliveries. There is no evidence that his work took him from a terminal to a warehouse. He was engaged in local distribution.

The issue paraphrased is this: Is a wholesaler who, with the exception of an infinitesimal sale of goods in his own state, purchased and carried out of the state by two isolated purchasers, does a purely intrastate wholesale business, within the purview of the Fair Labor Standards Act, if he acquires a considerable portion of his merchandise for sale from out of the State?

Were the court to decide in the affirmative, the control of the Federal Government over business that is purely local would be complete. Were this remote connection with interstate commerce to be considered within the jurisdiction of the national government, it would be extremely difficult to say how far the Federal Government can regulate local business. The interpretative bulletins of the administrators of the Fair Labor Standards Act are a patent attempt at a far reaching enlargement of government control, and if successful will be emphatically subversive of our conceived notions as to local, state autonomy.

The Defendant, if engaged in interstate commerce, was only such in a contemplation of the source of its merchandise and not the distribution of it. Until decided cases of the United States Supreme Court have been entirely discredited, the Defendant was, therefore, engaged purely in intrastate commerce. The interstate commerce terminated at the warehouse of the Defendant.

The Plaintiff, while he was a truck driver, was either engaged in interstate commerce, or he was not. We are clear that he was not. Had he been engaged in interstate commerce as to maximum hours, he was completely within the jurisdiction of the Interstate Commerce Commission and not of the Fair Labor Standards Act. If we are correct that he was not engaged in interstate commerce, he was not within the pale of the Fair Labor Standards Act by either horn of

the dilemma and cannot recover in this action for maximum hours.

The Defendant performed no services as broker. It never sold what it did not own and already have in its warehouse. It negotiated no sales directly from the manufacturer or shipper to its customers. It did not, therefore, promote the stream of commerce. Half of its volume was bought and sold locally from local farmers. The right of inspection as to much of its merchandise, to wit, the citrus fruit, under the terms of the Uniform Sales Act, made the passage of title to the Defendant a State of Maine transaction.

While it is true that for the convenience of local purchasers most of the oranges and grapefruit, and practically all of the potatoes were sold in the original packages, nevertheless, the stream of commerce had ended and the original package doctrine under the decisions cannot prevail. *Brown* v. *Bailey*, the decision of the Supreme Court of Tennessee hereinafter cited, is on all fours with the instant case with reference to the original package doctrine.

The bulwark of defense in this case and in similar cases will be the now famous Schechter case of the United States Supreme Court, which still stands in full force and vigor. Until that case has been completely discredited, the Plaintiff cannot successfully prosecute the issue here. Later cases of the United States Supreme Court which are cited herein with the Schechter case, to wit, *Jones* v. *McLaughlin* and *Carter* v. *Carter Coal Company*, have held that where there is a close and substantial relation to interstate commerce, the government may regulate at the source to protect that commerce from burdens and obstructions. Yet, the last two cases assume that there is interstate commerce and in the instant case, the Schechter case has definitely adjudicated that interstate commerce has ended before the Defendant has distributed its goods. The Schechter case is a stubborn fact.

LAW

The Fair Labor Standards Act of 1938

Title 29, U. S. C. A. in section 202 defines industries covered as follows:

. . . "industries engaged in commerce . . . in the production of goods for commerce.".

Commerce is defined in section 203

"(b) 'Commerce' means trade, commerce, transportation, transmission or communication among the several states or from any state to any place outside thereof."

(All of the Defendant's merchandise was purchased locally or finally landed from interstate shipment at a dead end street, to wit, Carr Brothers, Inc. warehouse.)

Minimum wages (sec. 208) are

(1) No less than 25c per hour during first year from effective date.

(2) No less than 30c per hour during next six years.

Maximum hours are (sec. 207)

(1) No more than 44 hours first year.

(2) No more than 42 hours second year.

Exemptions of Employees (sec. 213)

"(b) The provisions of section 207 shall not apply with respect to (1) any employee with respect to whom the Inter-

state Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49; or (2) any employee of an employer subject to the provisions of Part 1 of the Interstate Commerce Act."

Section 304 of Title 49 "Motor Carrier Act (new) 1935" is as follows:

(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term 'motor carrier' shall be construed to include private carriers of property by motor vehicle in the administration of sections 304 (d) and (e), 305, 320, 321, 322 (a), (b), (d), (f) and (g), and 324 of this chapter."

Section 303 of Title 49 "Motor Carrier Act (New) 1935" defines "private carrier":

"(a) (17) The term 'private carrier' of property by motor vehicle means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

Bechtel v. *Stillwater Milling Co.*, 33 Fed. Supp. 1010.

Schechter v. U. S., 295 U. S. 495

@ 520 "The defendants are slaughterhouse operators of the latter class '(marketmen)'. A. L. A. Schechter Poultry

Corporation and Schechter Live Poultry Market are corporations conducting wholesale poultry slaughterhouse markets in Brooklyn, New York City. Joseph Schechter operated the latter corporation and also guaranteed the credits of the former corporation, which was operated by Martin, Alex and Aaron Schechter. Defendants ordinarily purchase their live poultry from commission men at the West Washington Market in New York City or at the terminals serving the city, but occasionally they purchase from commission men in Philadelphia. They buy the poultry for slaughter and resale. After the poultry is trucked to their slaughterhouse markets in Brooklyn, it is resold, usually within twenty-four hours, to retail poultry dealers and butchers who sell directly to consumers. The poultry purchased from defendants is immediately slaughtered, prior to delivery by schochtim in defendant's employ. Defendants do not sell poultry in interstate commerce."

@ 542 "Were these transactions 'in' interstate commerce? Much is made of the fact that almost all the poultry coming to New York is sent there from other states. But the code provisions, as here applied, do not concern the transportation of the poultry from other states to New York, or the transactions of the commission men or others to whom it is consigned, or the sales made by such consignees to defendants. When defendants had made their purchases, whether at West Washington Market in New York City or at the railroad terminals serving the city, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended. Defendants held the poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers, who in turn sold directly to consumers. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce." . . .

"The indisputed facts thus afford no warrant for the ar-

gument that the poultry handled by defendants at their slaughterhouse markets was in a 'current' or 'flow' of interstate commerce and was thus subject to congressional regulation. The mere fact that there may be a constant flow continues after the property has arrived and has become commingled with the mass of property within the state and is there held solely for local disposition and use. So far as the poultry herein questioned is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the state. It was not held, used or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other states. Hence decisions which deal with a stream of interstate commerce—where goods come to rest within a state temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here." . . .

@ 545 . . . "But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to Federal control." . . .

Jones v. *McLaughlin*, 301 U. S. 1.

This was a case of the National Labor Relations Board, and the court held that where you have interstate commerce, national control is essential or appropriate to protect that commerce from burdens and obstructions.

The Federal Wages and Hours Act

Harvard Law Review, Vol. 52, Page 646, @ Page 652. "Where a wholesaler or distributor ships goods outside the state, it seems apparent that he is 'engaged in commerce'. But only those of his employees occupied in loading or trucking are clearly so engaged. As to the others the problem is similar to that of 'back shop' railroad employees. Where the wholesaler or distributor imports goods for local distribution, the nature of the intermediate stoppage becomes important. If the goods are shipped to him, warehoused, and subsequently sold from the warehouse, it seems quite clear that, under existing authorities, the interstate movement has ended and that he is engaged in a purely local activity. Only those employees engaged in the actual unloading process are engaged in commerce, and even as to them a prolonged delay renders the Act unapplicable. If the goods are so resold that the continuity of the shipment is not broken, however, resort may be had to the 'flow of commerce cases' " . . .

Attention of the court is invited to the voluminous and learned foot notes 53 through 58 accompanying the above text and especially note 55 which declares that *Schechter* vs. *United States* cited supra is very much in point in the instant case although the Administrator of the Wage and Hour Division under the Fair Labor Standards Act "appears to minimize if not to ignore the apparent continued validity of this case."

Note 55 is in full as follows:

"*Atlantic Coast Line R. R.* v. *Standard Oil Co. of Ky.*, 275 U. S. 257 (1927); *Hartford Accident & Indemnity Co.* v. *Illinois ex rel. McLaughlin*, 298 U. S. 155 (1926); *Winslow* v. *Fed. Trade Comm.*, 277 Fed. 206 (C. C. A. 4th, 1921), cert. denied, 258 U. S. 618 (1922); *Jell-O* v. *Landes*, 20 F. (2d)

120 (C. C. A. 9th, 1927); *Southern Pac. Co.* v. *Van Hoosear*, 72 F. (2d) 903 (C. C. A. 9th, 1924); *United States* vs. *Rogles*, 9 F. Supp. 857 (E. D. Mo. 1935); *United States* v. *French*, 10 F. Supp. 674 (E. D. Mich. 1935) (NRA); *Fleischmann Co.* v. *Conway*, 166 La. 547; 122 S. 845 (1929). This was substantially the factual situation in *A. L. A. Schechter Poultry Corp.* v. *United States*, 295, U. S. 495 (1935). The Administrator appears to minimize if not to ignore the apparent continued validity of this case. See Interpretative Bulletin No. 5 (16). But see Questions and Answers No. 5."

Brown v. *Bailey*, 147 Southwestern 2nd 105, decided February 3, 1941; also cited *Commerce Clearing House*, paragraph 60256. In this case defendant employer was a wholesale liquor distributor in Tennessee with a warehouse and business in the City of Chattanooga. It sold whiskey to dealers in Tennessee partly in broken packages and partly in the original package which had come from outside the state. The plaintiff employee was the night watchman at the warehouse. The defense was that the liquor came to rest at the warehouse in Chattanooga and thereafter was in intrastate commerce.

The court held that in spite of the sale in part of the product in the original containers, interstate commerce stopped in the warehouse of the defendant. A point was made of the fact that the defendant did no brokerage and therefore took no part in the stream of commerce.

Atlantic Coast Line Railroad Co. vs. *Standard Oil Co.*, 275 U. S. 257. Oil was brought by boat from Louisiana and Mexico to the plaintiff company in Florida. It was pumped to the tanks at Florida of the plaintiff. The plaintiff distributed and sold the oil in Florida. The United States Supreme Court held that this was intrastate commerce.

Laurence Baggett vs. *Henry Fischer Packing Company*, United States District Court, Western District of Kentucky, February 24, 1941, Commerce Clearing House, paragraph 60298.

The court held on motion that for an employee to come within the provisions of the Fair Labor Standards Act, he must allege and prove that he was engaged in commerce or in the production of goods for commerce; that it was not enough that the employer was.

Abadie vs. *Cudahy Packing Co. of La.*, United States District Court of La., Commerce Clearing House, paragraph 60314.

While the Plaintiff was engaged as a local truck driver, as to maximum hours, as we have said before, he was under the Interstate Commerce Commission.

Gibson vs. *Wilson & Co.*, United States District Court, Tenn., March 20, 1941, Commerce Clearing House, 60466.

As a local truck driver, the work of the Plaintiff was so remote as in no event to be part of the stream of commerce.

Rivera vs. *Central Augirre Sugar Co.*, U. S. District Court, Porto Rico, April 24, 1941.

Fleming, Administrator vs. *McGehee*, U. S. District Court, Fla., July 23, 1941, Commerce Clearing House, 60614.

The last case says, "That it is the business that the employee is engaged in rather than the business of the employer that determines whether the employee is under the Act or not." The same case holds that sales outside the state that are few and inconsequential compared to the Defendants' volume are of no effect. That the merchant must make substantial sales in interstate commerce to come within the Act.

See also:

Swift & Co. vs. *Welkerson*, Circuit Court of Appeals, 5th District, December 10, 1941, Commerce Clearing House, 60818.

Moses vs. *McKesson & Robbins, Inc.*, District Court, Southern District, Texas, February 20, 1942, Commerce Clearing House, 60952.

Hooks vs. *Nashville Breeko Block & Tile Co.*, U. S. District Court, Tenn., July 7, 1941, Commerce Clearing House, 60620.

This case held that a company engaged in the manufacture and sale of cinder blocks for building is not engaged in interstate commerce within the meaning of the Act, where 98½% of its sales are intrastate.

Gerdert, et als. vs. *Certified Poultry & Egg Co., et al.*, U. S. District Court, Fla., April 29, 1941, Commerce Clearing House, 60479.

This case found that a wholesaler who purchased goods from outside the state and to whom the goods were delivered in interstate commerce by interstate transportation, who took the goods shipped from the interstate carrier and placed them in his store or warehouse, and who later sold them locally, was not engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act. The court further held that isolated transactions in interstate commerce, not a part of the usual course of business, do not bring a wholesaler within the provisions of the Act. The decision said that such would be true even if the Act undertook to regulate such transactions as being a practice that injuriously affected interstate commerce or the free flow of goods in commerce.

Fleming, Administrator vs. *Belo Corp.*, U. S. Circuit Court of Appeals, 5th Circuit, June 27, 1941, Commerce Clearing House, 60569.

This case held that the interpretative bulletins of the Administrator are not binding or necessarily persuasive upon the courts.

H. W. Lamb vs. *Quality Bakery Co.*, Tenn. Court of Appeals, August 10, 1941, Commerce Clearing House, 60084.

In this case plaintiff was a baker. 99% of product sold in the state. 1% shipped outside the state. Approximately four shipments of some 50 to 100 lbs. each were made weekly to places, two or three in number, in other states. The court held that the interstate shipments were too inconsequential to make the provisions of the Act applicable. The Department bulletin of the Administrator was discredited because of the lack of any court decision.

Much capital will, no doubt, be made by the plaintiff of the case of *Fleming, Administrator,* vs. *Alterman Brothers,* U. S. District Court for the Northern District of Georgia, March 31, 1941, Commerce Clearing House, 60389, 38 Fed. Supp., 94. I am informed that in the Alterman Brothers case the learned Judge completely adopted the brief of the Wage and Hour Division. The case ignores the Schechter decision and other authorities collected in the Harvard Law Review, reference cited above. In spite of the broad dicta in the opinion, there are several facts which essentially distinguish the Alterman Brothers case from the instant case. In the Alterman case, 99½% of the goods sold by the employer originated outside of Georgia. A great deal of the merchandise was packed in Indiana and in California and labeled "Packed for Alterman Brothers." All of the merchandise was bought and sold, in the Alterman case, outside of the State of Georgia, where title passed. Practically all of the merchandise sold in Georgia was sold in original packages. Almost all orders were for future delivery. Goods were ordered to meet anticipated future deliveries, and the tempo of buying and selling was accelerated so much that the Judge found a pretext for visualizing a stream of commerce. Goods were kept on hand only to meet constantly recurring orders. Very frequently orders were taken prior to a purchase by the employer to fill the orders. Such never happened in the instant case. Much of the Alterman Brothers business was obtained through bids and long term contracts specifying the

size and kind of the product. Many were drop shipments, were made directly from the manufacturer to Alterman Brothers' customers. Such was pure brokerage, a practice which Carr Brothers never participated in. The Judge observes that some of Alterman Brothers' goods never stopped in their warehouse.

Reference is made to REVISED STATUTES OF MAINE FOR 1930, CHAPTER 165, SECTIONS 47 and 48, UNIFORM SALES ACT.

Recent cases in support of the employer-defendant-respondent contentions above are:

Isbell, Jr., vs. *V. W. Wood & Co.*, Alabama Intermediate Civil Court of Birmingham, April 30, 1941, Commerce Clearing House, 60723.

Jehs vs. *Singer Sewing Machine Co.*, District Court, Oklahoma, October 16, 1941, Commerce Clearing House, 60760.

Sybert vs. *Bradley et als.*, District Court, Southern District, Illinois, September 29, 1941, Commerce Clearing House, 60769.

Ranhoff et al. vs. *Gramling & Co.*, District Court, Eastern District of Arkansas, August 22, 1941, Commerce Clearing House, 60822.

White Motor Co. vs. *Littleton et al.*, Circuit Court of Appeals, 5th Circuit, December 12, 1941, Commerce Clearing House, 60825.

Respectfully submitted,

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